



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

MAY 3 2012

REPLY TO THE ATTENTION OF:

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Richard A. Duncan  
Faegre Baker Daniels  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-3901

Dear Mr. Duncan:

I have enclosed a file stamped Consent Agreement and Final Order ("CAFO") and Administrative Order which resolves case docket number CAA-05-2012-0021 with the Shakopee Mdewakanton Sioux Community (SMSC). As indicated by the filing stamp on its first page, we filed the CAFO with the Regional Hearing Clerk on MAY - 3 2012.

Pursuant to paragraph 32 of the CAFO, Red Wing SWBF must pay the civil penalty within 30 days of the date the CAFO is filed. Your check must display the case docket number, CAA-05-2012-0021, and the billing document number 2751203A023.

If you have any questions regarding this case, please contact Steven Kaiser, Associate Regional Counsel at (312) 353-3804.

Sincerely,

A handwritten signature in black ink that reads "William L. MacDowell".

William L. MacDowell, Chief  
Minnesota/Ohio Air Enforcement and Compliance Assurance Section

Enclosure

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

In the Matter of:	)	Docket No.	CAA-05-2012-0021
	)		
Shakopee Mdewakanton Sioux	)	Proceeding to Assess a Civil Penalty	
Community, Prior Lake, MN,	)	Under Section 113(d) of the Clean Air Act	
	)	42 U.S.C. § 7413(d)	
Respondent.	)		
_____	)		

**Consent Agreement and Final Order**

**Preliminary Statement**

1. This is an administrative action commenced and concluded under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d), and Sections 22.1(a)(2), 22.13(b), and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at 40 C.F.R. Part 22.

2. Complainant is the Director of the Air and Radiation Division, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is the Shakopee Mdewakanton Sioux Community (SMSC).

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action pursuant to the terms of this CAFO without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

2012 FEB -3 PM 2:13

ASSOCIATE REGIONAL CLERK  
U.S. EPA REGION 5

### **Jurisdiction and Waiver of Right to Hearing**

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations and any violation of the law in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal the final order accompanying the consent agreement.

### **Statutory and Regulatory Background**

9. "Indian Country" is defined as "(a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151

10. On June 19, 1978, EPA promulgated the Prevention of Significant Deterioration (PSD) regulations implementing, among other things, Section 165 of the Act. 43 Fed. Reg. 26403 (June 19, 1978). EPA revised the PSD regulations on several occasions including August 7, 1980 (45 Fed. Reg. 52676) and December 31, 2002 (67 Fed. Reg. 80186). These regulations are codified at 40 C.F.R. § 52.21.

11. The EPA implements the PSD regulations codified at 40 C.F.R. § 52.21 in Indian country located within the boundaries of the State of Minnesota. 40 C.F.R. § 52.21(a)(1), 40 C.F.R. § 52.1234.

12. The requirements of 40 C.F.R. § 52.21 apply to the construction of any new major stationary source or any major modification located in an area designated as attainment or unclassifiable for the National Ambient Air Quality Standards (NAAQS). 40 C.F.R. § 52.21(a)(2)(i).

13. A "major stationary source" is defined as, among other things, any stationary source that emits, or has the potential to emit, 250 tons per year (tpy) or more of nitrogen oxides (NO<sub>x</sub>). 40 C.F.R. § 52.21(b)(1)(i)(b), 40 C.F.R. § 52.21(b)(50).

14. A "major modification" is defined as, among other things, any physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase of NO<sub>x</sub> and a significant net emissions increase of NO<sub>x</sub>. 40 C.F.R. § 52.21(b)(3)(i). 40 C.F.R. § 52.21(b)(2)(i), 40 C.F.R. § 52.21(b)(50).

15. A significant emissions increase and significant net emissions increase of NO<sub>x</sub> is defined as the potential to emit a rate of emissions that would equal or exceed 40 tpy. 40 C.F.R. § 52.21(b)(23), 40 C.F.R. § 52.21(b)(40), 40 C.F.R. § 52.21(a)(2)(iv)(d).

16. "Begin actual construction" is defined as among other things, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. 40 C.F.R. § 52.21(b)(11).

17. Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD regulations implementing Section 165(a) prohibit an owner or operator from beginning actual construction of a major stationary source or major modification prior to the issuance of a permit stating that the major stationary source or modification would meet the requirements of 40 C.F.R. § 52.21 (j) through (r). 40 C.F.R. § 52.21(a)(2)(iii).

18. On July 1, 2011, EPA promulgated final rules "Review of New Sources and Modifications in Indian Country." 76 Fed. Reg. 38, 748-38, 808 (July 1, 2011) (to be codified at 40 C.F.R. parts 49 and 51). The final rules became effective on August 30, 2011. 76 Fed. Reg. at 38,748. The rules allow, among other things, for a synthetic minor source permit to be issued to an otherwise major source that has accepted restrictions, enforceable as a practical matter, so that the source's potential to emit is less than the emission amounts for major stationary sources or major modifications to major stationary sources.

19. The Administrator of EPA (the Administrator) may assess a civil penalty of up to \$37,500 per day of violation up to a total of \$295,000 for violations that occurred after January 12, 2009. Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1); and 40 C.F.R. Part 19.

20. Section 113(d)(1) limits the Administrator's authority to matters where the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action, except where the Administrator and the Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

#### **Factual Allegations and Alleged Violations**

21. SMSC is a federally recognized Indian tribe.

22. For purposes of federal enforcement, SMSC is, and at all times relevant to this CAFO was, a "person" as defined by Section 302(e) of the Act, 42 U.S.C. § 7602(e).

23. SMSC owns three diesel-fired generators, each rated at 2,937 hp (2,000 kW), identified as EU 116, EU 117, and EU 118 (hereinafter referred to as "the Subject Generators") in SMSC's June 2011, *Application for Construction Authorization of a Synthetic Minor Source at the Mystic Lake Casino Hotel*.

24. The Subject Generators are located in Prior Lake, Scott County, Minnesota, an area designated as either in attainment or unclassifiable with respect to the NAAQS at all times relevant to this Administrative Compliance Order. 40 C.F.R. § 81.324

25. The Subject Generators are located in Indian Country, as that term is defined at 18 U.S.C. § 1151, within the boundaries of the State of Minnesota.

26. The Subject Generators will support and be part of the Mystic Lake Casino Hotel, which is owned and operated by SMSC.

27. Mystic Lake Casino Hotel has the potential to emit greater than 250 tpy of NO<sub>x</sub>, and therefore, constitutes a major stationary source.

28. The Subject Generators have the potential to emit greater than 40 tpy of NO<sub>x</sub>, and therefore, constitute a major modification.

29. As of July 2011 SMSC had placed the Subject Generators on poured concrete pads in the location where the Tribe intends them to be permanently located and erected permanent steel stanchions for the purpose of supporting metal tubing through which electrical cables will run to transmit power from the SMSC generators to the Mystic Lake Casino Hotel.

30. SMSC violated 40 C.F.R. § 52.21(a)(2)(iii) by beginning construction of the Subject Generators prior to obtaining a permit stating that SMSC generators meet the conditions of 40 C.F.R. § 52.21(j) through (r).

#### **Civil Penalty**

31. Based on analysis of the factors specified in Section 113(e) of the Act, 42 U.S.C. § 7413(e) and the facts of this case, Complainant has determined that an appropriate civil penalty to settle this action is \$76,260.

32. Within 30 days after the effective date of this CAFO, Respondent must pay a \$76,260 civil penalty by cashier's check, certified check, electronic funds transfer, automated clearinghouse, or online payment.

**For checks sent by regular U.S. Postal Service mail:** send a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. EPA  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

**For checks sent by express mail:** send a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Bank  
Government Lockbox 979077  
U.S. EPA Fines and Penalties  
1005 Convention Plaza  
Mail Station SL-MO-C2-GL  
St. Louis, Missouri 63101

The check must include the case name, docket number of this CAFO, and the billing document number.

**For electronic funds transfer:** make the electronic funds transfer, payable to "Treasurer, United States of America," and send to:

Federal Reserve Bank of New York  
ABA No. 021030004  
Account No. 68010727  
33 Liberty Street  
New York, New York 10045  
Field Tag 4200 of the Fedwire message should read:  
"D68010727 Environmental Protection Agency"

In the comment or description field of the electronic funds transfer, include the case name, the docket number of this CAFO, and the billing document number.

**For Automated Clearinghouse (ACH) also known as REX or remittance express: make the ACH electronic funds transfer, payable to "Treasurer, United States of America," and send to:**

US Treasury REX/Cashlink ACH Receiver  
ABA: 051036706  
Account Number: 310006, Environmental Protection Agency  
CTX Format Transaction Code 22-checking

In the comment area of the electronic funds transfer, include the case name, the docket number of this CAFO, and the billing document number.

**For on-line payment:** make an on-line payment by going to [www.pay.gov](http://www.pay.gov). Use the Search Public Forms option on the tool bar and enter SFO 1.1 in the search field. Open the form and complete the required fields.

33. Respondent must send a notice of payment that states the case name, the docket number of this CAFO, and the billing document number to the following addresses when it pays the penalty:

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Reza Bagherian (AE-17J)  
Air and Radiation Division  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Steven Kaiser (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Eaton Weiler (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604



34. This civil penalty is not deductible for federal tax purposes.

35. If Respondent does not pay timely the civil penalty, EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States enforcement expenses for the collection action under Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

36. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue according to Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). This nonpayment penalty will be 10 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter.

#### General Provisions

37. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in this CAFO.

38. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

39. This CAFO does not affect Respondent's responsibility to comply with the Act and other applicable federal, state, and local laws.

40. This CAFO constitutes an "enforcement response" as that term is used in EPA's *Clean Air Act Stationary Source Civil Penalty Policy* to determine Respondent's "full

compliance history" under Section 113(e) of the Act, 42 U.S.C. § 7413(e).

41. The terms of this CAFO bind Respondent, its successors, and assigns.

42. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

43. Each party agrees to bear its own costs and attorney's fees in this action.

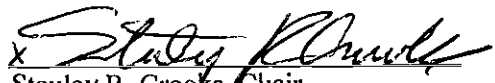
44. This CAFO constitutes the entire agreement between the parties.

45. The requirements of this CAFO shall be considered satisfied when the civil penalty has been paid.

46. EPA agrees to provide a copy of this CAFO to Respondent immediately upon filing with the Regional Hearing Clerk as provided in the Certificate of Service attached hereto.

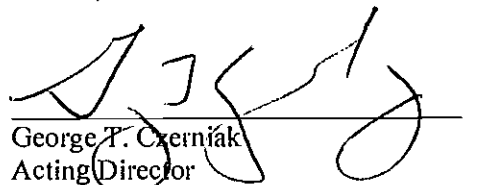
**Shakopee Mdewakanton Sioux Community, Respondent**

4-18-2012  
Date

x   
Stanley R. Crooks, Chair,  
SMSC Business Council

**United States Environmental Protection Agency, Complainant**

4/23/12  
Date

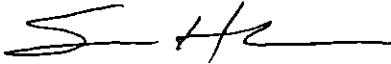
  
George T. Czerniak  
Acting Director  
Air and Radiation Division  
U.S. Environmental Protection Agency  
Region 5

Consent Agreement and Final Order  
In the Matter of: Shakopee Mdewakanton Sioux Community  
Docket No. CAA-05-2012-0021

**Final Order**

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

4-30-12  
Date

  
\_\_\_\_\_  
Susan Hedman  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5

In the Matter of the Shakopee Mdewakanton Sioux Community  
Docket No. **CAA-05-2012-0021**

**CERTIFICATE OF SERVICE**

I, Loretta Shaffer, certify that I hand delivered to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, the original and one copy of the Administrative Complaint and the Consent Agreement and Final Order, docket number CAA-05-2012-0021. Further, I certify that I mailed correct copies of the Administrative Complaint and Consent Agreement and Final Order, in the Administrative Complaint by first-class, postage prepaid, certified mail, return receipt requested, to the Respondent and Respondent's Counsel by placing them in the custody of the United States Postal Service addressed as follows:

Richard A. Duncan  
Faegre & Benson, LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-3901

on the 3 day of May 2012.

Loretta Shaffer

Administrative Program Assistant

REGIONAL HEARING CLERK  
U.S. EPA REGION 5  
2012 MAY -3 PM 2:13

CERTIFIED MAIL RECEIPT NUMBER: 7009168000076739610